No. 77-489

In the Supreme Court of the United States

OCTOBER TERM, 1977

CITY OF WILLCOX AND ARIZONA ELECTRIC POWER COOPERATIVE, INC., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION[1] IN OPPOSITION

[1] Pursuant to the Department of Energy Organization Act, Pub. L. 95-91, 42 U.S.C. 7101 *et seq.* (August 4, 1977), and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 13, 1977), on September 30, 1977, the Federal Power Commission ceased to exist, and most of its functions and regulatory responsibilities were transferred to the Federal Energy Regulatory Commission, which, as an independent commission within the Department of Energy, was activated on October 1, 1977. Section 705(e) of the Organization Act, 42 U.S.C. 7295, provides for the substitution of the new Commission as a party in cases such as this. For the purposes of this brief, the word "Commission" refers either to the Federal Power Commission or the Federal Energy Regulatory Commission, as the context indicates.

OPINIONS BELOW

The opinion of the court of appeals (Pet App. A) is not yet reported. The court's order denying petitions for rehearing and clarification (Pet. App. B) is not yet reported. The orders of the Federal Power Commission (Pet. Apps. C and D) are reported at 51 F.P.C. 2053 and 52 F.P.C. 1876, respectively. The Commission's July 29, 1977, order complying with the court's decision is attached hereto as Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1977. Petitions for rehearing and clarification were denied on August 18, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on September 28, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

STATUTES INVOLVED

Sections 4, 5, and 19 of the Natural Gas Act, 52 Stat. 822, 823, and 831, as amended, 15 U.S.C. 717c, 717d, and 717r, are set forth as Appendices E, F, and G to the petition. Section 16 of the Act, 52 Stat. 830, 15 U.S.C. 717o, is set forth as Appendix B hereto.

QUESTIONS PRESENTED

1. Whether the Commission abused its discretion in establishing a curtailment plan for El Paso Natural Gas Company pursuant to Sections 5 and 16 of the Natural Gas Act that relied on estimates of end-use consumption furnished to El Paso by its customers.

2. Whether substantial evidence supported the Commission's action in establishing curtailment priorities that gave the lowest priority to the use of natural gas as boiler fuel.

STATEMENT

1. In April of 1971 the Commission, foreseeing a shortage of natural gas, ordered all pipelines under its jurisdiction to file new tariffs providing, when necessary, for the rationing of gas among users. In July of 1971, in compliance with this order, the El Paso Natural Gas Company (El Paso) submitted proposed tariff revisions that would have allocated the available gas on the basis of the ultimate consumers' contracts with their suppliers and the amounts of gas the consumers had used in the past. In August of 1972, after hearings had been held on this proposal, El Paso withdrew the proposal and requested the Commission to issue, instead, an interim, emergency curtailment plan to be effective until a permanent plan could be established. The Commission granted this request and, in October of 1972, established an interim plan for El Paso which allocated gas to distributors on the basis of five priorities reflecting the "end use" of the gas. In December of 1972 the Commission modified the interim plan but denied rehearing. On appeal, the Commission's orders were affirmed in part, reversed in part, and remanded. *American Smelting and Refining Co.* v. *Federal Power Com-*

mission (*"ASARCO"*), 494 F. 2d 925 (C.A. D.C.), certiorari denied, 419 U.S. 882.

Meanwhile, the Commission had been proceeding with development of a permanent curtailment plan for the El Paso system, and on June 14, 1974, it issued Opinion No. 697, prescribing such a plan. The priorities of service established in Opinion No. 697 were similar to those of the interim plan. All ultimate uses of natural gas were classified into five priorities on the basis of end-use, with residential and small commercial users receiving the highest priority and large-volume industrial boiler users the lowest.

The Commission had previously assigned boiler fuel use to the lowest priority of service in the interim plan. However, the court in *ASARCO* had remanded this decision as lacking supportive findings and reasoning. In Opinion No. 697 the Commission articulated its rationale for the subordination of boiler fuel use as follows (Pet. App. A–91):

> For purposes of both the interim and permanent plans, the evidence indicated that alternate fuels could be more easily substituted for natural gas in boiler fuel applications than in other applications. Secondly, the evidence demonstrated that the increase in air pollution resulting from the use of alternate fuels could be more efficiently and economically controlled through the deployment of pollution abatement equipment by boiler fuel users because of the large size of individual installations. Third, by

> curtailing large volume boiler fuel users ahead of other industrial users the evidence showed that gas displacement could be maximized with a minimum of economic disruption and dislocation.

The Commission acknowledged that the assignment of boiler fuel use to the lowest priority was a departure from its policy that curtailment should fall first on customers who purchase gas on an interruptible rather than a "firm" contract basis (Pet. App. A–80).[2] This policy is based on the view that customers who require gas for human needs or nonsubstitutable industrial service do not normally contract on an interruptible basis.[3] But the Commission found that the record compelled a departure from the distinction between firm and interruptible contracts, inasmuch as El Paso's California customers were subject to regulations of the California Public Utilities Commission requiring that all contracts of industrial consumers for more than 200 Mcf of gas per day be interruptible. Thus, in California, an interruptible contract would not necessarily reflect a customer's lesser need for gas, but simply compliance with state regulations. No such limitation on the capacity to contract for firm service

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[2] See Order No. 467–B, 49 F.P.C. 583 (1973), petitions for review dismissed *sub nom. Pacific Gas & Electric Co.* v. *Federal Power Commission*, 506 F. 2d 33 (C.A. D.C.).

[3] See, *e.g.*, Opinion No. 643, 49 F.P.C. 53 (1973), remanded *sub nom. Arkansas Power & Light Co.* v. *Federal Power Commission*, 517 F. 2d 1223 (C.A. D.C.).

existed with respect to El Paso's East-of-California (E–O–C) customers. Under these circumstances, the Commission concluded that the firm-interruptible distinction was not useful and was potentially discriminatory (Pet. App. A–80–A–84).

In Opinion No. 697–A, issued on December 19, 1974, the Commission modified the plan in several respects but denied rehearing of the decision on boiler fuel classification (Pet. App. A–125, A–126).

Pursuant to Opinion Nos. 697 and 697–A, El Paso submitted to the Commission end-use information obtained from its customers and proposed tariff sheets. Numerous parties filed comments and responses. On December 24, 1975, the Commission issued an order (attached as Appendix C) clarifying Opinion Nos. 697 and 697–A and requiring modification of the tariff sheets. The City of Willcox, Arizona, and the Arizona Electric Power Cooperative (AEPCO) objected to El Paso's utilization of end-use figures supplied by its major California customers, on the ground that the figures were based on "unknown and unsupported data" which Willcox and AEPCO had not had the opportunity to test by cross-examination. The Commission rejected this objection because there was no allegation and no evidence of error or impropriety in the figures (App. C, *infra;* see Pet. App. A–52–A–55).

2. The court of appeals, while finding error and remanding with respect to certain issues, upheld the Commission's findings on both the subordination of boiler fuel and the methodology of compiling end-use data (Pet. App. A–1, A–20–A–23, A–52–A–55).

On the boiler-fuel question, although the court found that there was not substantial evidence to support the Commission's finding that "alternate fuels could be more easily substituted for natural gas in boiler fuel applications than in other applications" (Pet. App. A–20–A–21 and note 8), it upheld the Commission's two other findings (see pp. 4–5, *supra*). The court held that there was sufficient record evidence for the conclusion that increased air pollution resulting from the use of alternative fuels could be more efficiently controlled, per unit of fuel, by boiler fuel users because of the large size of their installations (Pet. App. A–22–A–23). And, on the basis of similar evidence (primarily from the witness Markus) concerning the magnitude of gas boilers, the court upheld the Commission's finding that subordination of large boilers would result in curtailment of fewer plants (Pet. App. A–23).[4]

The court rejected the argument of Willcox and AEPCO that El Paso improperly utilized end-use data provided by its customers. The contention was that "[s]ince these nominations were made after El Paso's customers first suffered curtailment, they may

[4] The court noted that these two findings had been rejected as justifications for boiler-fuel subordination in curtailment plans involved in two other cases, *Arkansas Power & Light Co.* v. *Federal Power Commission* ("*Arkla*"), 517 F. 2d 1223, 1228 (C.A. D.C.), certiorari denied, 424 U.S. 933, and *Louisiana* v. *Federal Power Commission*, 503 F. 2d 844 (C.A. 5). But it held that the causes for such rejection had been removed by the record evidence and the Commission's reasoning in this case. Pet. App. A–23.

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well be tainted by self-serving exaggerations of requirements in higher priorities" (Pet. App. A–52). The court noted, however, that Willcox and AEPCO had not shown that there were in fact any such overstatements. The court held (Pet. App. A–54):

> At an earlier part of this opinion, we have relied (to the benefit of the petitioners) on the presumption the Commission's orders would not be evaded, and that it was impermissible for the designation of particular end use to turn on the unsubstantiated expectation of fraud. This same presumption must operate here. [Footnote omitted.]

Because there had been no showing that there was improper reporting of end-use data, the court suggested that the case was different from *Louisiana* v. *Federal Power Commission*, 503 F. 2d 844 (C.A. 5), where the curtailment plan under review for the United Gas Pipe Line Company had generated a high number of complaints and where the proposed permanent plan departed significantly from the interim plan that was already in effect (Pet. App. A–53). The court rested its holding on the conclusion that the Commission's action was not arbitrary or capricious or an abuse of discretion (*ibid.*).

The court noted further that the petitioners were not without protection. If they should produce "specific evidence of substantial abuse" in the method of calculating end-use consumption, the Commission "would be required to reconsider whether the 'nomination' procedure was reliable" (Pet. App. A–53–A–54).[5]

ARGUMENT

Willcox and AEPCO contend that the court of appeals erred in (1) upholding the Commission's decision to subordinate boiler fuel use to other uses of natural gas in El Paso's curtailment plan, and (2) upholding the Commission's decision to authorize El Paso to ration gas supplies among its customers on the basis of estimates provided by the customers. But, as the court of appeals held, the Commission's action on each issue was within its statutory authority and was supported by substantial evidence and reasoning. Neither issue merits review by this Court.

1. The Commission was justified in finding, pursuant to Sections 5(a) and 16 of the Natural Gas Act, that boiler fuel must be subordinated to other uses in El Paso's curtailment plan. The Commission relied on substantial record evidence establishing the superior economies that large boiler users enjoy with respect to pollution control after they convert to alternative fuels (see Pet. App. A–22–A–23). In addition, the record shows that because large boilers use larger quantities of gas, their curtailment results in a lesser number of total industrial curtailments (see Pet. App. A–23). The Commission thus properly concluded, and explained, that boiler fuel use should be

[5] Pursuant to Section 1.6 of the Commission's Rules of Practice and Procedure, 18 C.F.R. 1.6, any person can file a complaint relating to a pipeline's curtailment plan.

subordinated because of these public benefits in minimizing pollution and economic disruption.

There is no merit in the claim that, in allocating gas on the basis of end-use and subordinating boiler fuel use, the Commission improperly abrogated the contract rights of customers holding firm contracts. The permissibility of relying on end use as an allocative scheme, with respect to the El Paso system specifically, was upheld in *ASARCO, supra* (494 F. 2d at 935–936; see also *Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 646–647). And as the court here recognized (Pet. App. A–48), the Commission was reasonable in deciding that the California regulations restricting the use of firm contracts impaired the informative function that contractual choices serve when made in a free market.

2. Nor is there substance in petitioners' argument that the Commission's method of compiling end-use data by relying on the "nominations" of El Paso's customers was impermissible. Petitioners did not show that the method is erroneous or unfair. Their unsubstantiated suspicions of fraud do not establish sufficient reason to reject the Commission's decision. Neither does the Commission's reliance on a presumption that there is no fraud shift to petitioners any burden of proof that they did not already have. As the court held, if petitioners do produce specific evidence of substantial abuse, they are free to return to the Commission, which would then be compelled to reconsider the question.

The Commission's determinations here represent the application of policies set forth in Order No. 467–B, 49 F.P.C. 583, to a particular pipeline, El Paso. The evidence relating to boiler fuel and the situation dictating the method of end-use data collection are peculiar to the El Paso system. No broad policies applicable to other pipelines are established by either determination.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1978

APPENDIX A

Curtailment Plan; Rehearing; Practice and Procedure (Consolidation); Hearing

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and John H. Holloman III.

EL PASO NATURAL GAS COMPANY, DOCKET NO. RP72–6

Order Denying Motion for Stay, Granting Rehearing, Modifying Curtailment Plan, Establishing Further Hearings, Consolidating Hearings, and Requiring Action to Obtain Remand of Record

(Issued July 29, 1977)

On June 1, 1977, we ordered the curtailment plan formulated in Opinion Nos. 697 and 697–A and clarified in orders issued December 24, 1975, October 15, 1976, and June 1, 1977, to be implemented July 1, 1977.

On June 30, 1977, the United States Court of Appeals for the District of Columbia Circuit issued its opinion on petitions for review of Opinion Nos. 697 and 697–A in *City of Willcox and Arizona Electric Power Cooperative Inc.* v. *FPC,* —— F. 2d —— (No. 74–2123, *et al.*). The decision requires modification of our holdings in Opinion Nos. 697 and 697–A in five specified areas:

(1) fuel devoted to ignition and flame stabilization must receive Priority 2 status (Part II);
(2) electricity generating turbines must not be classified with boilers, in Priorities 4 and 5, but are entitled to a higher priority (Part III);
(3) attachments of new users up to December 19, 1974, must be incorporated in measuring uses by priority classification during the base period (Part IV);
(4) pre-existing shortages of natural gas in California during the base period must be considered in determining California's volumetric entitlement (Part IV); and
(5) gas used from storage facilities must be taken into account (i) to the extent its source has been from El Paso, (ii) in proportion to the actual end use of such storage gas, (iii) and with safeguards against according priority to gas both as it is pumped into storage and as it is withldawn therefrom (Part V).[1]

On June 29, 1977, a motion for stay of the order issued June 1, 1977, was filed by the City of Willcox and Arizona Electric Power Cooperative, Inc., ("AEPCO"), and on July 1, 1977, a telegram motion for postponement of the effective date of the tariff sheets implementing the plan was filed by Arizona Public Service Company ("APS"). Tucson Gas and Electric Company ("TG&E") filed a motion on July 8, 1977, to vacate the June 1, 1977, order insofar as it would result in placement of electric generating turbine fuel in Priority 5. On July 15, 1977, APS filed a document joining in TG&E's motion and modifying its earlier motion by indicating that it now only seeks reclassification of gas turbine fuel requirements.[2]

[1] *Slip op.*, p. 56.

[2] "Joinder of Arizona Public Service Company in Motion of Tucson Gas & Electric Company to Vacate, in Part, the Approval of the Curtailment Provisions of El Paso Natural Gas Company"

Objections to any stay of the June 1, 1977, order were filed on July 5, 1977, by Pacific Gas and Electric Company and Southern California Gas Company. General Motors Corporation filed objections to a stay of implementation on July 14, 1977.

On July 1, 1977, AEPCO and APS also filed separate applications for rehearing of the June 1, 1977, order. AEPCO argues that rehearing must be granted and the effectiveness of the Opinion Nos. 697 and 697–A plan stayed because of the Court's determinations concerning the classification of fuel for gas turbines used to generate electricity and of storage injection volumes. APS suggests that the effect of the June 1, 1977, order on distributor load upgrading should be reconsidered.

THE EFFECTIVE PLAN

The motions and applications for rehearing do not raise matters compelling a postponement of implementation of the Opinion No. 697 and 697–A plan as an interim plan. The Court's decision, however, requires us to make modifications, some of which will be accomplished herein. Others will require the development of a more complete record before appropriate modifications can be directed.

The Court's decision does not prevent the Opinion Nos. 697 and 697–A plan from being implemented pursuant to the June 1, 1977, order. The Court has not vacated Opinion Nos. 697 and 697–A, and, in its discussion on the procedures for reviewing the environmental impact of the plan, the Court has recognized that this plan may be implemented as an interim plan. The Court specifically refrained from interfering with

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the effectiveness of the Opinion Nos. 697 and 697–A plan at this time:

The fourth modification, consideration of pre-existing shortages of natural gas in California during the base period, cannot be implemented without obtaining additional information concerning the cause and extent of the pre-existing shortages. We, therefore, will require this matter also to be explored in further hearings in this docket. These hearings should develop a record on the following questions:

> (1) What was the level of natural gas service by California distributors served by El Paso during the two years prior to initial curtailments by El Paso and the level of service during the period subsequent to the commencement of curtailments;
>
> (2) What new requirements by customers were attached (new customers or expanded service to existing customers) during the two years immediately preceding the commencement of El Paso's curtailments;
>
> (3) To the extent that there were unserved requirements attached during the two year period preceding the commencement of El Paso curtailments, were such attachments the result of an attachment policy of the individual El Paso customers and/or state authorities, and were such attachments predicated upon the receipt of any new or increased gas supplies;
>
> (4) What was the level of natural gas deliveries from all sources other than El Paso (separately identified by source) to California customers of El Paso during the two years prior to the commencement of curtailment by El Paso;

> (5) Were there any reductions in deliveries of natural gas to California customers of El Paso from California intrastate natural gas production sources during the two years prior to El Paso's curtailment; if there were such reductions, what was the amount of such reductions and were such reductions the result of cut-backs to gas producer gas contract minimum delivery amounts by customers of El Paso or their suppliers or the result of declining gas reserves?[10]

The foregoing questions, however, do not establish the bounds of inquiry into pre-existing California shortages. The Administrative Law Judge presiding in the hearing on the preexisting California shortages may require and/or receive other evidence relevant to the inquiry.

> . . . This plan is officially an interim one . . .[3]
>
> * * * * *
>
> . . . We refrain from staying the applicability of the interim plan until the environmental statement has issued . . .[4]
>
> * * * * *
>
> The issuance of Order No. 697 (as modified by 697–A) should not be held up pending an environmental impact statement.[5]

The court clearly intended to permit the Opinion Nos. 697 and 697–A plan to be effective with modifications. There is no indication that the defects noted

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[10] If declining reserves are the cause, data as to reserves and production for the four years prior to commencement of curtailment by El Paso, by area, should be introduced in evidence.

[3] *Slip op.*, p. 39.

[4] *Id.* 42.

[5] *Id.* 47.

by the Court are a bar to the plan's implementation as an interim plan, nor is there any indication of a time limit within which defects must be cured. We are herein making immediate changes in the plan and establishing proceedings and the other such steps in order to affect complete remedies of all the defects in the interim plan as quickly as possible. But, in the absence of a vacation of Opinion Nos. 697 and 697–A, and, in light of the overall approach of the Court, it is appropriate to conclude that the Court envisioned that the plan contained in these Opinions would be effective as an interim plan with its required modifications to follow *post haste*, or, in any event before utilization as a permanent plan.[6]

Since we are prohibited by Section 19(a) of the Natural Gas Act from modifying Opinion Nos. 697 and 697–A as long as the record in this proceeding remains with the Court, we will direct the Solicitor to seek remand of the record for the purpose of implementing the modifications set forth below.

MODIFICATIONS

Implementation of some of the modifications required by the Court's decision cannot be accomplished without further hearings. As to the first required modification, we have already required flame stabilization and ignition fuel to be placed in Priority 2 until a Commission decision is issued in the ongoing hearings (Phase) in this docket concerning the appropriate classification of such use.[7]

[6] *Id.* 55.

[7] "Order Denying Rehearing, Further Clarifying Opinions, and Requiring Modification of Proposed Tariff Sheets", issued October 15, 1976, Paragraph (E).

The second modification, reclassification of electricity generating turbine fuel from Priorities 4 and 5, we will implement by hereby directing that such requirements be maintained in Priority 3, as requested by AEPCO, until further order of the Commission. We will direct that further hearings be held to develop a record in this proceeding to determine whether such requirements should be reclassified from Priority 3.

The third modification, incorporation of the requirements of new residential and commercial users attached up to December 19, 1974, in the base period requirements, shall be accomplished by requiring El Paso to amend its base period requirements and the end-use profiles by incorporating such additional requirements. We are limiting our order to the incorporation of only new high priority requirements, rather than all requirements, since it is apparent from the Court's discussion that its decision regarding changing the base period requirements was in response to the arguments of TG&E and APS that they had added 3,000 residential and commercial users between October 31 and December 19, 1974.[8]

In accordance with the Court's directive,[9] there will be further hearings to determine whether APS and Tucson Gas and Electric ("TG&E") were dilatory in obtaining state permission to reject new customers after December 1974, and whether an additional base period adjustment should be permitted these customers for attachments occurring between December 19, 1974, and the date of state action.

[8] *Slip op.*, p. 27, footnote 10.

[9] *Id.*, p. 29.

The last modification, the treatment of customer storage injection volumes, is particularly troublesome since we have taken substantial pains in clarifying orders to establish a prioritization arrangement which we believed was most equitable. Our method is based on allocating storage injection volumes received from El Paso on the basis of the proportional end-use of *all gas* by the receiving customer during the winter base period. This method does not permit double accounting of storage volumes (counting it in the base volumes as in a priority both on injection and withdrawal).[11] The Court, however, has required that prioritization of storage volumes must be "in proportion to the actual end-use of such *storage gas*". (Emphasis added). The Court has also required that there must be "safeguards" against double accounting of the gas.

In order to satisfy this last Court-required modification, it is apparent that we will have to attempt that which we have previously believed well-nigh impossible: tracing storage gas from El Paso into its customers' storage then back out to an ultimate end-use. Further hearings to devise a methodology for allocating customer storage injection gas deliveries by El Paso which meet the Court's requirements, therefore, are necessary.

In the proceeding in Docket No. RP76–38, we have required an inquiry to be conducted to determine the end-use of storage injection volumes improperly delivered by El Paso to its California customers during the effective period of the Opinion Nos. 634 and

[11] "Order Denying Rehearing and Accepting Tariff Sheets", Docket No. RP 72–6, issued June 1, 1977, p. 6–9.

634–A interim plan, December 15, 1972, until terminated by Commission order issued on June 21, 1977.[12] While the purpose of this inquiry differs from our object in the remanded storage portion of the proceedings in Docket No. RP72–6, a consolidation of the hearings nevertheless is appropriate. Since both inquiries involve tracing of the use of storage volumes delivered by El Paso and since the base period for the permanent plan as now expanded by the Court (October 31, 1971, to December 19, 1974) and the period in question in the proceedings in Docket No. RP76–38 overlap for the period December 15, 1972, to December 19, 1974, there exists a common question of fact: what end-use was made of the storage injection volumes delivered by El Paso during the period December 15, 1972, to December 19, 1974? The consolidated hearings, however, should be expanded beyond the confines of the common factual question to include an investigation of the use of storage injection volumes by El Paso's California customers back to the commencement of the Opinion Nos. 697 and 697–A plan base period and a determination of the best method of allocating storage injection volumes under the Opinion Nos. 697 and 697–A plan which also conforms to the Court's requirements.[13]

[12] "Declaratory Order on Complaint and Order Instituting Investigation", Docket No. RP 76–38, issued June 21, 1977, p. 12–13.

[13] It should be noted that the assumption that storage withdrawals on a given day, contribute proportionately to every customer served that day suggested at p. 13 of the order issued June 21, 1977, in Docket No. RP76–38, may require reconsideration in light of the Court's discussion of the function of storage gas at *slip op.*, p. 37.

El Paso-delivered storage injection volumes play an important part in the service of natural gas to California markets. Since the previously effective Opinion Nos. 634 and 634–A plan contains no provision for storage injection volumes, we cannot temporarily revert to the storage feature in that plan while awaiting the results of the consolidated hearings on storage. We see no feasible alternative but to continue the treatment of storage volumes developed in the orders clarifying Opinion No. 697 and 697–A until a determination is made on the remanded storage question. Parties receiving storage injection volumes under the presently effective plan are warned that receipt of such volumes will be subject to possible future adjustment in storage injection volume authorized for delivery and to a payback obligation for amounts in excess of the volumes authorized under the storage injection allocation methodology to be developed.

APS's arguments in its application for rehearing concerning load upgrading are, in essence, a recasting of assertions contained in AEPCO's application for rehearing of the October 15, 1976, order and in El Paso's tariff filing made in compliance with the October 15, 1976, order which we found meritless in the June 1, 1977, order at p. 14–15. As such, APS is seeking a rehearing of a denial of rehearing which is not permitted by our Rules of Practice and Procedure.

The Commission finds:

(1) Good cause has not been shown for staying the effective date of the tariff sheets accepted and placed in effect July 1, 1977, by our order issued June 1, 1977.

(2) The curtailment plan developed in Opinion Nos. 697 and 697–A and clarified in orders issued Decem-

ber 24, 1975, October 1976, and June 1, 1977, should be modified pursuant to the decision in *City of Willcox and Arizona Power Cooperative, Inc.* v. *F.P.C., supra,* in the manner indicated above.

(3) The decision in *City of Willcox and Arizona Power Cooperative, Inc.* v. *F.P.C., supra,* requires that further evidentiary hearings be held in this docket as set forth hereinafter.

The Commission orders:

(A) The motion for stay filed by AEPCO and application for rehearing filed by APS are denied.

(B) The applications for rehearing filed by AEPCO, and the motion of TG&E are granted insofar as matters raised therein shall be the subject of further hearings ordered in Paragraphs (C) and (D) or are the subject of the modifications in the Opinion No. 697 and 697–A plan directed in Paragraph (E).

(C) As soon as may be practicable, hearings shall be convened before an Administrative Law Judge designated by the Chief Administrative Law Judge to determine the following matters:

(1) Whether requirements of gas turbine used to generate electric energy be reclassified from Priority 3;

(2) Whether APS and TG&E were dilatory in obtaining a moratorium on new attachments after the issuance of Opinion No. 697–A or whether the actions of APS and TG&E were excusable and reasonable justifying the inclusion in the base period volumes of requirements of customers attached during the period between December 19, 1974, and the imposition of a new attachment moratorium by state authorities;

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(3) What was the source and extent of natural gas shortages in California which pre-existed curtailments on the El Paso System and to what extent should base period requirements (or other elements of the Opinion Nos. 697 and 697–A plan) be modified to take into consideration such pre-existing California gas shortages in order to assure a just and reasonable and not unduly preferential or discriminatory curtailment plan?

(D) Hearings shall also be held to investigate the end-use of storage injection volumes delivered by El Paso during the base period and to develop a method of allocating storage injection volumes received by customers from El Paso which will be consistent with the requirement of the Court that such gas be allocated on the basis of the actual end-use of the storage gas withdrawals originally supplied by El Paso and "with safeguards against according priority to gas both as it is pumped into storage and as it is withdrawn therefrom". Such hearings are hereby consolidated for hearing and decision with the proceedings in Docket No. RP76–38.

(E) Until further Commission order, the curtailment plan developed in Opinion Nos. 697 and 697–A and clarified in orders issued December 24, 1975, October 31, 1976, and June 1, 1977, shall remain in effect as prescribed therein; provided, however, that requirements of gas turbines used to generate electric energy shall be placed in Priority 3, ignition fuel and flame stabilization requirements shall remain in Priority 2, and requirements of new residential and commercial customers attached between October 31, 1974, and December 19, 1974, shall be included in base period requirements the foregoing modifications in the

Opinion Nos. 697 and 697–A plan shall be effective as of the date of remand of the record by the Court. The Solicitor is hereby directed to seek remand of the record in this proceeding for the purpose of implementing these modifications.

By the Commission.

[Seal]

LOIS D. CASHELL,
Acting Secretary.

APPENDIX B

Natural Gas Act, Section 16, 52 Stat. 830, 15 U.S.C. 717*o*:

ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

APPENDIX C

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, and James G. Watt.

EL PASO NATURAL GAS COMPANY, DOCKET NO. RP72–6

Order Clarifying Opinions, Requiring Modification of Tariff Sheets, and Establishing Hearing on Limited Issue

(Issued December 24, 1975)

On December 19, 1974, the Commission issued Opinion No. 697–A with the intent of placing in effect the curtailment plan prescribed in Opinion No. 697, as modified by Opinion No. 697–A, as soon as possible as a new interim plan replacing the currently effective one. After completion of a review of the environmental issues on a limited reopened record to determine what modifications might be required by environmental considerations, it was intended that the plan as appropriately modified would be ordered in effect as the permanent curtailment for the El Paso Natural Gas Company ("El Paso") system. Several parties, however, raised issues in petitions for rehearing and reconsideration of Opinion No. 697–A. On March 21, 1975, the Commission issued an order setting for hearing the issue of whether El Paso had appropriately classified irrigation pumping fuel use in applying Opinion No. 697–A. The order also deferred action on the requests for a similar hearing on

El Paso's classification of ignition fuel and flame stabilization uses in electric generation plants and on the effect of Opinion No. 697 and No. 697–A on higher priority load growth in the East of California ("EOC") market until El Paso had a chance to make its determination of alternate fuel capability for such purposes and file tariff sheets prepared accordingly.

El Paso presented base volume and end-use profile information and tendered for filing proposed tariff sheets purportedly conforming to Opinion Nos. 697 and 697–A on March 27 and April 11, 1975. As indicated in the "Notice of Intention to Act and Order Granting Intervention" issued June 17, 1975, protests against or motions to reject or stay the proposed tariff sheets and petitions for clarification of Opinion No. 697–A and responses thereto were received from numerous parties.

Disposition has subsequently been made of two of the issues toward which protests or motions have been directed. On August 5, 1975, the Commission affirmed an initial decision [1] concluding that El Paso's permanent curtailment plan should permit customers of El Paso who take deliveries of natural gas at multiple delivery points to "group" or aggregate their entitlements at those points for purposes of calculating their allocations of gas under the permanent plan. Similarly, on November 13, 1975, the Commission issued Opinion No. 745, modifying an initial decision determining that irrigation pumping fuel requirements should presently be classified in Priority 2, rather than in priority 3 as El Paso had done in constructing the end-use profiles contained in its tariff sheet, tendered for filing on April 11.

[1] See also "Order Denying Petition for Reconsideration" issued November 3, 1975.

A total of 13 [2] customers have filed protests or motions seeking clarification of Opinion No. 697–A, objecting to El Paso's removal of ignition fuel and flame stabilization from Priority 2 and reclassification of such uses into lower priority categories.[3] These customers state that the change is a surprise and allege that they have no alternate fuel facilities designed, much less installed. Estimates of time for conversion range from 18 months to two years and according to the customers would involve the investment of substantial amounts of capital.[4] The customers also emphasize the unique and critical nature of the use of natural gas for flame stabilization and ignition in boilers. We also note that based upon the filings there may be a difference in the nature of the use of gas as between oil and coal fired boilers and perhaps as between different installations of the same types. El Paso Electric Company's comments suggest that the principal use of gas is to assure that its oil fired boilers have a back-up system to continue heating the boilers in the event of a fuel oil supply system failure and to quickly reignite the oil after a flame-

[2] City of Willcox and Arizona Electric Power Cooperative, Southwest Gas Corporation, Southern California Edison Company, Arizona Public Service Company, Navajo Tribal Utility Authority, El Paso Electric Company, Kennecott Copper Corporation, Nevada Power Company, Los Angeles Department of Water and Power, San Diego Gas & Electric Company, Community Public Service Company, Tucson Gas & Electric Company, Salt River Project Agricultural Improvement and Power District.

[3] Compliance filing, April 11, 1975, Tab. A, p. 2, 3.

[4] E.g., El Paso Electric Company: 2 years and $550,000 for flame stabilization and $500,000 for ignition fuel. Protest filed May 9, 1975, p. 3; Arizona Public Service Company: Total of 18 months and $19,000,000 for ignition fuel and flame stabilization. Motion filed May 9, 1975, p. 15.

out. Southern California Edison Company advises, however, that it uses gas to continuously dry coal slurry pumped to the Mohave generation plant, a function which it apparently considers to be an ignition fuel function. Kennecott Copper Company states that 100% fuel oil use in certain of its boilers will produce a flame-out for unknown reasons. Both flame stabilization and ignition fuel functions as described in the comments, are apparently continuous, and the amounts of gas used for such purposes are substantial.[5] The apparent diverse applications of natural gas within the common usage of the terms "flame stabilization" and "ignition fuel", the size of the volumes and the fact that the gas does provide boiler heat are factors raising the possibility that not all volumes allegedly requested for ignition fuel and flame stabilization are used for limited ignition and flame regulation purposes as we have previously believed. Based upon the above allegations, it is necessary to hold a limited hearing in this proceeding, the record of which shall be denoted "Ignition Fuel and Flame Stabilization", to consider whether some or all alleged flame stabilization and ignition requirements are Priority 2 uses as the customers insist or are properly classified in El Paso's proposed tariff sheets.

In our order issued October 14, 1975 we denied motions by Stauffer Chemical (Stauffer) and Empire Machinery Company (Empire) for reclassification of requirements associated with their respective total energy systems. In view of the arguments of Stauffer and Empire, it appears appropriate to clarify our

[5] The Mohave generation plant uses 10,400 Mcf/d under "full" load—Southern California Edison, Protest filed October 17, 1975, p. 3.

revisions of the treatment of total energy systems in Opinion No. 697–A in several respects.

In Opinion No. 697–A the Commission required commercial total energy systems to be treated in the same manner as industrial energy systems, i.e., by identifying the separate end-use functions accomplished by a total energy system, determining the natural gas requirements related to each end-use function, and appropriately categorizing such requirements by applications of the definitions contained in Order No. 493–A. The Commission did not intend to exclude all total energy system requirements from Priority 2. Only those requirements associated with end-use functions that are plant protection or process in nature, however, should be classified in Priority 2.

There is no evidence supporting a distinction between the generation of electric energy for sale or for the generator's own use. Requirements related to the generation of electric energy by a gas turbine which is an integral part of a total energy system would be classified by application of the definition of "boiler fuel" contained in Order No. 493–A even though the total energy system owning customer consumes all such generated energy.

In light of the foregoing clarifications Stauffer, Empire and El Paso should reconsider the classification of Stauffer and Empire's requirements and El Paso shall file amendments to its March 28 or April 11, 1975, compliance filing as may be appropriate along with other amendments required below.

El Paso's proposed tariff sheets provide for daily and seasonal curtailment on a priority basis, that is with overrun penalties applicable to each priority of each customer daily and seasonal allocations. A num-

ber of protests and motions have been filed to this treatment. While the Commission did reject the Presiding Judge's proposed "moving base period" which would have permitted periodic upgrading of a distributor's loads, the Commission did not intend to completely remove all flexibility from distributors in meeting the requirements of high priority customers during temperature extremes or place a penalty on adherence to local curtailment requirements. The requirement that El Paso curtail on a daily basis with penalties assessed for daily and seasonal overruns,[6] was only intended to apply to aggregate daily and seasonal takes. El Paso, therefore, will be required to revise its proposed tariff sheets accordingly.

Tucson Gas and Electric Company ("TG&E"), City of Mesa, Arizona ("Mesa"), and Arizona Public Service Company ("APS") protest or request clarification of El Paso's method of calculating the index of base volumes and further claim that El Paso has misconstrued Opinion No. 697–A in this regard. TG&E believes that the additional volumes of gas determined by annualizing Priority 1 and 2 requirements as of October 31, 1974, should be added to lower priority base volumes for the period ending October 31, 1972, rather than substracted from these volumes, which is the method used by El Paso. APS and Mesa similarly argue that the Commission intended to permit increases in the EOC customers' base volumes by adjusting 1972 actual deliveries to include increased requirements of Priority 1 and 2 customers attached as of October 31, 1974.

In its compliance filing of April 11, 1975, El Paso sets forth the method used to adjust base volumes in

[6] Opinion No. 697–A, p. 8–11.

accordance with Opinion No. 697–A at Tab B of its filing. Page 2 of Tab B indicates that El Paso did not increase base volumes for the 12 months ending October 31, 1972, where Priority 1 and 2 requirements for the year ended October 31, 1974, as adjusted, did not exceed base volumes for the year ended October 31, 1972. But, at Page 1 of Tab B, the example used by El Paso shows that base volumes for the year ending October 31, 1972, were increased if Priority 1 and 2 nominations for the year ending October 31, 1974, as adjusted, exceeded the base volumes for the prior period.

The net effect of El Paso's interpretation of Opinion No. 697–A is to freeze base volumes to actual deliveries during the 12 month period ending October 31, 1972, unless a customer's Priority 1 and 2 volumes as adjusted exceeded the 1972 deliveries.

El Paso applied the adjusted end-use profiles to the base volumes and simply eliminated the requirements for the lowest priority uses in excess of the monthly base volume as indicated by Footnote No. 4 of Tab B at Page 2.

El Paso's methodology thus results in reduction of lower priority requirements of EOC customers which, in turn, means that deliveries to these customers for lower priority uses are restricted if El Paso's supply would otherwise permit deliveries within lower priority requirements to its other customers. El Paso has misconstrued Opinion No. 697–A in this regard. The intent expressed therein is for El Paso to adjust the base volumes for the 12 months ending October 31, 1972, by adding increased requirements for Priority 1 and 2 loads attached as of October 31, 1974. The Commission intended for El

Paso in computing the adjustments to base volumes for the 12 months ending October 31, 1972, to (1) determine on the basis of the best information available Priority 1 and 2 consumption for the 12 months ending October 31, 1972, (2) compute the Priority 1 and 2 requirements for the 12 months ending October 31, 1974, adjusted for consumers attached as of that date, and (3) add the difference to base volumes for the 12 months ending October 31, 1972. The resulting base volumes as adjusted would be subject to the limitation contained in Opinion No. 697–A (except as to Mesa and other similarly situated customers)[7], i.e., these adjusted base volumes shall not exceed 100 percent entitlement of daily contract quantities on a seasonal or annual basis.

As was indicated in Opinion No. 697–A, it is recognized that the adjustment clarified above is an adjustment which, by increasing base volumes to EOC customers over those contemplated in Opinion No. 697, may cause some diversion of deliveries from lower priority California customers that would not have occurred if Opinion No. 697 were effective. We reaffirm the belief that such diversion does not constitute undue discrimination under the circumstances. It should also be noted, however, that development of base volumes as herein clarified will result in less deliveries to EOC distributor customers of El Paso than are occurring under the currently effective interim curtailment plan.

Related to the foregoing is the issue of the impact of Opinion No. 697–A on the continued attachment of EOC customers the consideration of which we stated in the March 21, 1975, order would be deferred

[7] See *infra*, p. 9.

until after the filing of proposed tariff sheets in compliance with Opinion No. 697–A.[8] The issue in its barest form is whether additional gas should be taken away from existing low priority users to serve new high priority EOC load growth which has developed subsequent to October 31, 1974. In Opinion No. 697–A, at p. 4–5, we recognized that by permitting an upward adjustment in the Opinion No. 697 base period volumes through the inclusion of annualized Priority 1 and 2 load attachments as of October 31, 1974, and the recognition of an exception to the maximum daily delivery obligation limitation in favor of customers with Priority 1 and 2 peak day requirements in excess of such obligations, would involve discrimination, but not undue discrimination. To make further adjustments in the curtailment plan in the direction urged by the protesting parties would approach the realm of undue discrimination.

We are not persuaded by the arguments of the Arizona Corporation Commission, and others, that the Arizona customers had no choice but to permit attachments due to legal requirements imposed on Arizona distributors to accept unlimited attachments until the moritorium imposed by the Corporation Commission on May 6, 1975. APS has submitted, as Exhibit A to its motion of May 9, 1975, a copy of Arizona Corporation Commission Decision No. 43377 issued

[8] In addition to the deferred motions on this issue filed by Southwest Gas Corporation and the City of Las Cruces and Rio Grande Natural Gas Association, protests and motions in this regard have been received from APS, TG&E, Citizens Utilities Company, Arizona Corporation Commission, Southern California Gas Company, Pacific Gas & Electric Company, San Diego Gas and Electric Company, and Mesa. El Paso also commented on this issue in its compliance filing.

June 19, 1973, denying an application of APS for a temporary moratorium on attachments. The order reflects that evidence was presented of an imminent emergency shortage of gas. The order also clearly reflects that the Corporation Commission was persuaded that any moratorium ". . . would redound to the benefit of customers in other states supplied by El Paso" because, if a moratorium were imposed, "[t]his would mean that in the case of future gas curtailment by El Paso, Arizona's share of gas for high priority customers would be less proportionately than it is at present." Thus, the Corporation Commission consciously pursued an aggresive distributor attachment policy until the last moment in order to capture for Arizona customers the greatest possible share of El Paso's gas supply. It should also be noted that the Commission in Opinion No. 697, p. 10, warned all of El Paso customers against abusing the exemption for Priority 1 and 2 loads by permitting growth in these priorities which would result in deliveries beyond the base volume limits established for the curtailment plan. While we cannot condemn the action of the Corporation Commission for performing its function of fostering Arizona's best interests as it sees them, nevertheless the Corporation Commission's argument, in its motion filed May 12, 1975, that ". . . any limitation of quantities related to numbers and loads of high priority customers should be prospective so that state commissions have time to take appropriate action in light of the federal directive to the distributor," strikes us as disingenuous, the Corporation Commission is now objecting to a situation that is partly of its own making.

While we deny any general adjustment for new EOC high priority load growth, we note that individ-

ual customers whose highest priority requirements are in jeopardy can file petitions for special relief pursuant to 18 C.F.R. § 2.78(b).

Several parties filed requests for clarification and protests regarding the omission in Opinion No. 697–A of any weather adjustment to compensate for an alleged unusually warm winter during the base period.[9] The motions and protests in this regard are untimely requests for rehearing of Opinion Nos. 697 and 697–A since we gave no indication of any intent to inject a weather normalization adjustment into the calculation of base volumes. Moreover, we are not pursuaded by the comments of the parties that an additional adjustment in favor of the EOC high priority users is warranted.

Southwest Gas Corporation seeks clarification of the Commission's intention concerning treatment of emergency volumes as provided for under El Paso's proposed tariff Section 11.8, Original Sheet 63–H. Southwest Gas questions whether such volumes are subject to payback by curtailment of Priorities 1 and 2 and requests clarification regarding the payback obligation of specific customers benefitted by the emergency volumes. Finally, Southwest Gas requests clarification of the applicability of overrun penalties to emergency relief volumes. General Motors Corporation expressed its view regarding payback in its comments on El Paso's tariff filing, and concluded generally that the Commission should not equivocate its intent to require payback of emergency relief volumes.

[9] TG&E, APS, Arizona Corporation Commission, Citizens Utilities Company, City of Las Cruces and Rio Grande Natural Gas Association and Mesa. El Paso invites the Commission's attention to this matter in its compliance filing of March 28, 1975.

El Paso's proposed tariff Section 11.8, *Emergency Relief From Curtailment* (Original Sheet No. 63–H), provided in part as follows:

> "Immediately upon termination of the emergency conditions requiring waiver of curtailment provided hereunder, the Buyer or Direct Customer shall so notify Seller and will reduce its takes of gas from Seller to the level permitted under normal operating conditions existing at that time and shall further reduce its permitted takes of gas from Seller, to the extent possible without causing another emergency, as required to repay the supplemental volumes of gas utilized during the emergency exemption from curtailment."

With respect to the clarification requested by Southwest Gas regarding applicability of overrun penalties to volumes delivered under Section 11.8, we believe that emergency deliveries, if justified, should not be subject to overrun penalties. In the event that emergency deliveries were found to be unjustified, it is conceivable that overrun penalties could be applicable upon a proper evidentiary showing.

As to the remaining questions posed by Southwest Gas, we believe that El Paso's tariff provision is adequate and sufficiently establishes the payback obligation and the general standards under which payback will be affected. Our experience has indicated that imposition of specific payback obligations and repayment formulae are best resolved on a case-by-case basis. Likewise, the question of which consumers should be responsible for payback cannot be, in our judgment, resolved in an abstract fashion and must await determination on the basis of known facts.

The City of Tucson, Arizona, filed a petition for leave to intervene and asserted that its municipal

water supply, which is dependent of [sic] El Paso gas as fuel for its well pump engines, may be threatened by a potential classification and of irrigation pumping fuel in Priority 3 and in this vein attacked the failure in Opinion Nos. 697 and 697–A to distinguish between well pump and irrigation pump fuel. The applicable terms and conditions in El Paso's proposed tariff, however, correctly follow Order No. 493–A. The definition of "commercial" uses in the Proposed Third Revised Sheet No. 61, § 11.1(b) includes "Service to . . . local . . . government agencies for uses other than those involving manufacturing or electric power generation". Municipal water service would be within the category of "commercial" use, and, as such, should be placed in Priority 2.

Mesa has presented a motion requesting clarification of an apparent conflict between the Commission's views expressed in Opinion No. 697 as to the nature of the protection that Mesa requires due to its atypical excess of actual Priority 1 and 2 requirements over contract entitlements and the operational effect of the end use profile developed by El Paso for the city pursuant to Opinion No. 697–A. In Opinion No. 697, the Commission affirmed the results of an initial decision denying Mesa's application for extraordinary relief from curtailment noting that, under the permanent curtailment plan as then contemplated, Mesa's requirements would be protected through the use of historical requirements in its seasonal profiles. Mesa now requests clarification of Opinion No. 697–A with respect to whether historical usage or the daily delivery obligation in its contract with El Paso would operate to limit its curtailed Priority 3 entitlements. In Opinion No. 697–A, the Commission intended that,

by carving out an exception to the general limitation of deliveries to contract maximum daily delivery obligations for Mesa and similarly situated customers, El Paso's deliveries to Mesa should only be limited by the combination of peak day requirements of Mesa's Priority 1 and 2 loads attached as of October 31, 1974. The Commission further provided that Mesa's annual and seasonal base volumes would be calculated without application of daily contract quantities on a seasonal or annual basis. The Commission did not intend that Mesa's contract limits should have any further effect in determining deliveries to Mesa. Thus, El Paso should not require Mesa to curtail its Priority 3 requirements 100% on any day that its Priority 1 and 2 requirements exceed its contract entitlements, as Mesa states El Paso intends to do under the permanent curtailment plan.

The City of Willcox, Arizona, and Arizona Electric Power Cooperative (together "AEPCO") protest the treatment afforded by the proposed tariff sheets both to the gas provided to Pacific Gas and Electric ("PG&E") and Southern California Gas Company ("SoCal Gas") for storage injection and to gas to be injected by El Paso in its own storage. The volume of summer deliveries to PG&E and SoCal Gas by El Paso for storage injection entitled to Priority 2 classification is stated in Section 11.3(g) of El Paso's proposed tariff. AEPCO argues that these volumes are based on "unknown and unsupported data". AEPCO further asserts that it should have the opportunity to cross examine witnesses on the method of arriving at the quantities in question and the supporting data. El Paso, however, has adequately supplied the method and data used in arriving at the volumes in

question for PG&E at tab no. 56 of its April 11, 1975, compliance filing. The method used conforms to Opinion No. 697–A. The method of determining SoCal Gas' storage volumes subject to Priority 2 treatment is similarly set forth at tab no. 72, but the accompanying seasonal profile worksheets do not contain sufficient data to permit verification of El Paso's calculation. SoCal Gas will therefore be required to submit to El Paso revised worksheets containing sufficient data to permit calculation of the appropriate storage injection volumes to be awarded Priority 2 classification pursuant to Opinion No. 697–A, and such worksheets shall be filed by El Paso along with revised tariff sheets and end-use profiles as required herein.

It is unclear what AEPCO is suggesting in arguing that it is entitled to cross-examine witnesses "concerning the methods of determining such requirements" If by "methods", it means the formula for allocating the appropriate storage volumes to Priority 2, the objection is in the nature of an untimely request for rehearing of Opinion No. 697–A and for further evidentiary proceedings thereon. If by "methods", it is meant the construction of PG&E and SoCal Gas's seasonal profile data, AEPCO would appear to be requesting that the Commission conduct a detailed investigation in a hearing to verify these two customers' data. Although the data supplied with respect to SoCal Gas is deficient, there is presently neither an allegation nor any evidence of error or impropriety with regard to its data or the data of PG&E. In the absence of such an allegation or evidence, we find no basis for requiring an investigatory hearing concerning the two customer's data. In this regard, the data submitted by the two customers will be accorded the

same treatment as that submitted by AEPCO's end-use profiles at tab no. 94 of El Paso's April 11, 1975, compliance filing.

As to Priority 2 classification accorded all El Paso's own storage injection requirements, AEPCO requests that we require that, at a minimum, El Paso's proposed tariff provisions be amended to limit Priority 2 treatment only to net storage injections proportional to winter Priority 1 and 2 system sales. We see no basis, however, for limiting Priority 2 classification to net rather than gross volumes. We also note that §§ 11.3A(b) and 11.3C of El Paso's currently effective tariff, Original Volume No. 1, limits El Paso's storage withdrawals from its only operational storage facility to those days when El Paso would be required to curtail Priority 1 and 2 service or such service is in jeopardy.[10] We, therefore, believe the tariff amendments relating to El Paso's use of storage suggested by AEPCO are both inappropriate and unnecessary.

PG&E suggests that by limiting proportional Priority 2 treatment to summer storage injection volumes, it can be inferred that Priority 2 treatment cannot be accorded to volumes which are destined for storage injection during the winter period. PG&E proposes that the same proportional treatment should be pro-

[10] In this regard, El Paso has brought to our attention in its compliance filing of April 11, 1975, the misleading characterization in Opinion No. 697–A, p. 15, of El Paso's own storage operations as a "source of system supply in winter and as a company use requirement in the summer." Temporary autthorization to operate El Paso's sale storage field was granted in Docket No. CP 73–334, in part on the understanding that withdrawals are to be used only to protect EOC Priority 1 and 2 requirements and that injection volumes are made available due to additional curtailment of the lowest EOC priority deliveries during the summer.

vided for such winter volumes as is provided to summer storage volumes. PG&E overlooks the effect of determining classification of storage injection requirements on the basis of anticipated average winter season use of storage withdrawals. All of PG&E's end-use requirements during the winter are taken into account in calculating the proportional amount of gas which will be used by PG&E in satisfying requirements classified in the various curtailment priorities during the winter period. Underlying the averaging treatment of storage set forth in Opinion No. 697 is the assumption that PG&E will serve a portion of Priority 1 and 2 requirements from its storage every day during the winter season. Conversely, it is assumed that every day of the period injections into storage will occur. If, in fact, on some days during the winter season storage injection is possible due to fortuitous weather conditions, PG&E will be injecting gas received from El Paso not needed to meet certain requirements for which PG&E has been given credit for serving in the construction of its end-use profile for that day. Thus, the gas PG&E injects on such a winter day will be gas which for allocation purposes is classified in the priority for which actual requirements are less than PG&E's end-use profile authorizes. The modification suggested by PG&E, therefore, does not appear to be appropriate or necessary.

The City of Las Cruces and Rio Grande Natural Gas Association (together "Las Cruces") object that, in constructing end-use profiles, El Paso has not permitted any adjustment to the actual use data for the year ended October 31, 1972, except to eliminate the effect of curtailments and to reflect the annualized effect of attached Priority 1 and 2 loads as of October

31, 1974. Las Cruces believes that we intended to permit other adjustments to the 1972 data. The Commission did not intend to permit adjustments to the 1972 data other than the aforementioned, and El Paso appears to have correctly applied Opinion No. 697–A in construction Las Cruces' profiles.

Salt River Project Agricultural Improvement and Power District ("Salt River") requires clarification of whether the Commission intended to limit El Paso's daily authorization to deliver gas to a given customer to the maximum daily delivery obligation in the contract between El Paso and such customer which was in force on October 31, 1972 or the currently effective contract. Salt River apparently negotiated a new contract to go into effect subsequent to October 31, 1972, with lower maximum delivery obligations than under the previous contracts. Under the currently effective interim plan, a daily limitation for any EOC customer was established in Opinion No. 634 based on the maximum daily delivery obligations contained in contracts in force at the time of issuance of the opinion (October 31, 1972). In Opinion No. 697–A, the Commission stated the limitation as follows:

> Therefore, the maximum daily demand obligtion in the customer's contract with El Paso shall be operative with respect to determining the limitations on El Paso's daily delivery obligation to that customer. (Opinion No. 697–A, p. 6).

The Commission intended by the phrase "in the customer's contract" to refer to a customer's contract in existence at the time of issuance of Opinion No. 697–A since any contract not in effect at that time was not, in fact, "the customer's contract."

The Commission finds:

(1) A hearing is needed to acertain whether El Paso has correctly determined that none of the volumes it delivers for flame stabilization and ignition fuel in electric generating plants is classifiable as "process gas" includable within Priority 2 in compliance with Opinion Nos. 697 and 697–A.

(2) The motion of Mesa for clarification of the method of calculating curtailed entitlements for EOC customers whose peak day Priority 1 and 2 requirements exceed maximum daily delivery obligation should be granted.

(3) It is appropriate to clarify Opinion Nos. 697 and 697–A to affirm that curtailment pursuant thereto was intended to be on an aggregate, not priority by priority, basis.

(4) It is appropriate to require El Paso to revise the index of base volumes.

(5) It is appropriate to deny all petitions for reconsideration of Opinion No. 697–A and motions or protests relating to El Paso's proposed tariff sheets requesting adjustment of the historical base period to accommodate growth in the EOC market.

(6) It is appropriate to deny all motions or protests seeking adjustment of the historical base period data utilizing a weather normalization factor.

(7) Additional data should be submitted supporting SoCal Gas storage injection volumes classified in Priority 2.

(8) Good cause exists for permitting the participation of Reynolds Metals Company as an intervenor and for permitting the People of the State of California and the Public Utilities Commission of the State of California to file comments out of time.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the authority conferred upon the Federal Power Commission by the Natural Gas Act, particularly Sections 4, 5, 15, and 16 thereof, the Commission's Rules of Practice and Procedure, and the Regulations under the Natural Gas Act, a public hearing shall be held as soon as practical to ascertain whether El Paso has correctly determined that none of the volumes which it delivers for use as flame stabilization and ignition fuel in electric generating plants is classifiable as "process gas" includable within Priority 2 in compliance with Opinion Nos. 697 and 697–A.

(B) An Administrative Law Judge to be designated by the Chief Administrative Law Judge shall preside at the hearings ordered in paragraph (A) of this order. A prehearing conference will be held as soon as practicable at which time further procedural dates shall be established by the Presiding Administrative Law Judge.

(C) Opinion No. 697–A is clarified by stating that El Paso authorized daily or seasonal deliveries to EOC customers whose peak day requirements in Priorities 1 and 2 since December 15, 1972, have exceeded contractual maximum daily demand obligations are to be determined without reference to contract entitlements.

(D) El Paso shall amend its proposed tariff sheets to require unauthorized overrun penalties to be applied to takes in excess of aggregate authorized quantities of gas in all curtailment priorities during relevent periods.

(E) El Paso shall make upward revisions as necessary in its index of base volumes by adding to customers' actual takes for the year ended October 31, 1972, the amounts by which the annualized Priority 1 and 2 loads attached as of October 31, 1974, exceed the Priority 1 and 2 actual takes for the year ended October 31, 1972, subject to the limitation of 100 percent of entitlement of daily contract quantities on a seasonal or annual basis (except for EOC customers whose peak day demand requirements in Priority 1 and 2 since December 15, 1972, have exceeded contractual maximum daily demand obligations).

(F) All motions or protests requesting adjustment of the historical base period established in Opinion No. 697–A to accommodate growth in the EOC market are denied.

(G) All motions or protests seeking adjustment of the historical base period data through the utilization of a temperature normalization factor are denied.

(H) Reynolds Metals Company is hereby authorized to participate in this proceeding as an intervenor, provided however that (1) participation shall be limited to matters affecting asserted rights and interests specifically set forth in the petition to intervene; (2) permission to intervene shall not be construed as recognition by the Commission that the intervenor might be aggrieved because of any order or orders issued by the Commission in this proceeding; and (3) participation is conditioned upon acceptance of the record in this proceeding as it now stands.

(I) The People of the State of California and the Public Utilities Commission of the State of California are authorized to file comments out of time.

(J) SoCal Gas shall submit to El Paso revised worksheets containing sufficient data to permit calculation of storage injection volumes classified in Priority 2.

(K) El Paso shall file within 60 days of this order revised worksheets for So Cal Gas and revised proposed tariff sheets and end-use profiles consistent with the terms and conditions of Opinion Nos. 697 and 697–A and orders, as clarified by this order.

By the Commission.

[Seal]

KENNETH F. PLUMB,
Secretary.

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